87-1723

NO.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

C. M. ENGLISH, Petitioner

v.

PABST BREWING COMPANY and PMP FERMENTATION PRODUCTS, INC., a wholly owned subsidiary of PABST BREWING COMPANY., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

David E. Ralston
Attorney at Law
18 Depot Street
P. O. Box 1196
Blue Ridge, Georgia
30513
(404) 632-2221

Counsel for Petitioner

QUESTIONS PRESENTED

1. WHETHER THE NOTICE REQUIREMENTS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) MAY BE EQUITABLY TOLLED UNTIL SUCH TIME AS AN EMPLOYEE OBTAINS KNOWLEDGE THAT HIS JOB TERMINATION WAS DISCRIMINATORY, THEREBY ELIMINATING THE NEED TO FILE A CHARGE OF DISCRIMINATION UPON DISMISSAL WHETHER OR NOT INDICIA OF AGE DISCRIMINATION ARE PRESENT?

2. WHETHER THE COURT OF APPEALS COMMITTED ERROR BY EMBRACING THE DISTRICT COURT'S EVALUATION OF THE FACTS OF THIS CASE AND, IN SO DOING, UNDERTOOK TO RESOLVE GENUINE FACTUAL DISPUTES?

LIST OF PARTIES

The parties to the proceedings below were the petitioners, C. M. ENGLISH, and the respondents, PABST BREWING COMPANY and PMP FERMENTATION PRODUCTS, INC., a wholly-owned subsidiary of PABST BEWING COMPANY. The parties are still before this court on this petition.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

C. M. ENGLISH, Petitioner

v.

PABST BEWING COMPANY and PMP FERMENTATION PRODUCTS, INC., a wholly owned subsidiary of PABST BREWING COMPANY, Respondents

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, C. M. English, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-captioned proceeding on September 15, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 828 F. 2d 1047 and is reprinted in the appendix hereto.

The memorandum of decision of the United States District Court for the Western District of North Carolina is reported at 645 F. Supp. 186 and is reprinted in the appendix hereto.

JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. §626 (b), the petitioner brought this action in the Western District of North Carolina. On October 8, 1986, the District Court granted respondents' Motion for Summary Judgment.

On petitioner's appeal, the Fourth Circuit on September 15, 1987, entered judgment and an opinion affirming the District Court's decision and order. No petition for re-hearing was sought.

The jurisdiction of this court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. §1254 (1).

STATUTE INVOLVED

29 U.S.C.§626 (d) Record keeping, investigation and enforcement: Filing of charge with Commission; timeliness, conciliation, conference and persuasion.

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed -

1) Within 180 days after the date the alleged unlawful practice occurred; or

2) In a case to which section 633 (b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all

persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.

STATEMENT OF THE CASE

The petitioner was employed by the respondents as a field sales representative on August 4, 1958 until his termination on February 15, 1982.

Following his termination, the petitioner filed a charge of discrimination with the Equal Employment Opportunity Commission district office in Charlotte, North Carolina alleging that he had been discriminated against on account of his age by his involuntary separation. Thereafter, the petitioner brought this action in the United States District Court for the Western District of North Carolina, pursuant to §7 (b) of the Age discrimination and

Employment Act (ADEA), alleging therein that the respondents had unlawfully and impermissibly terminated his employment in the violation of the provisions of the ADEA, and sought as damages his unpaid compensation and benefits to which he would have been entitled.

Upon being employed by the respondents as a field sales representative in 1958, the petitioner was first assigned responsibility for sales of the respondents' product line, including malt products, in the southeastern United States. Subsequent to his employment, the petitioner's sales territory was extended beyond its original bounds including the states of North Carolina, South Carolina, Georgia and Florida, to also include Virginia, Tennessee, West Virginia and the eastern half of Tennessee.

In 1973, the petitioner was assigned sales responsibilities within his territory for chemical products, including enzymes and gluconates, in addition to malt products.

At the time the petitioner was first given chemical sales accounts as part of his sales responsibilitites, the approximate annual average sales generated in the sales territory for which he was responsible, was $35,000.00. By 1981, the chemical sales accounts in this territory had increased to approximately $250,000.00 annually. In 1978, the petitioner's sales territory was once again extended to include the remaining portion of the State of Tennessee and all of Mississippi and Louisiana. In addition, the petitioner assumed even more malt sales accounts due to an acquisition of another company by the respondents.

At all times during the course of the petitioner's work with the respondents, his job performance received only favorable and acceptable ratings. At no time during the course of his employment, was the petitioner notified by the respondents that he was deficient in any skills or

qualifications necessary to handle sales of either chemical products or malt products in his territory. In the time period immediately preceding his termination in February, 1982, the petitioner had received no information or indication from the respondents that they were considering the possibility of restructuring or altering their work force in any manner.

In February, 1982, the petitioner was summoned to the Milwaukee, Wisconsin headquarters of the respondents and was informed on February 9, 1982, the date of the petitioner's 65th birthday, by his two sales supervisors that he was being terminated as of February 15, 1982. The petitioner was informed at the time that the respondents would be handling sales of its product line in the southeastern United States by telephone and not by direct, in the field contact. The

petitioner was given no consideration for any other or new positions within the respondents' organization. The only field representatives given consideration for retention were two younger individuals.

After terminating the petitioner, the respondents hired Donald Lex, 25 years of age, on July 19, 1982. It was not until late August, 1982, that the petitioner learned that Mr. Lex had been employed in a position substantially comparable to that which had been occupied by the petitioner during the course of his own employment. After learning of Mr. Lex's employment, the petitioner thereupon filed a charge of discrimination with the EEOC District Office in Charlotte, North Carolina on February 3, 1983.

During the course of his employment with the respondents, the petitioner worked almost entirely in the field and was physically present in the respondents' offices in Milwaukee only once each year

and never more than two times in any given year.

Subsequent to the filing of his charge of discrimination with the EEOC District Office, the petitioner thereupon brought an action in the United States District Court for the Western District of North Carolina under the ADEA alleging age discrimination in the employment decision by the respondents to terminate his employment. Following the completion of discovery, the respondents filed a Motion for Summary Judgment in the District Court. The District Court entered an order on October 8, 1986, granting the respondents' Motion for Summary Judgment. The District Court held that the petitioner was time-barred for not having filed a charge of discrimination with the EEOC within 180 days after the alleged unlawful practice occurred and, further, that the petitioner had failed to establish a prima facie case

of prohibited age discrimination sufficient to withstand a Motion for Summary Judgment.

Petitioner then filed a Notice of Appeal and appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals entered a decision on September 15, 1987, affirming the District Court's decision.

The Court of Appeals considered the issue of whether the petitioner had timely filed a charge of discrimination with the EEOC under the concept of equitable tolling. This analysis involved a consideration of whether the respondents properly posted notice of the petitioner's ADEA rights in a reasonable manner and substantially in compliance with the statute and also the respondents giving to the petitioner a pretextual reason for his termination. The Court of Appeals, although acknowledging the analysis of the Fifth Circuit in

a factually similar case, elected to reject the interpretation of the posting requirement expressed in that decision and concluded that because ADEA rights notices were posted on the respondents' facilities in Milwaukee, that there had been compliance with the statute. The Court of Appeals further rejected the petitioner's claim that the actions on the part of the respondents should relieve the petitioner from the statutory limitations period for the filing of his charge of discrimination.

The Court of Appeals further agreed with the District Court that the petitioner had failed to carry his burden of proving that his termination from employment was the result of age discrimination.

REASONS FOR GRANTING THE WRIT

I.

THE FOURTH CIRCUIT'S INTERPRETATION OF THE EQUITABLE TOLLING DOCTRINE IS UNDULY RESTRICTED AND INCONSISTENT WITH THE DECISIONS OF OTHER CIRCUITS.

The federal courts have repeatedly held that the timeliness requirement contained in the ADEA is a statute of limitations and is subject to waiver, estoppel and equitable tolling. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (182) and Vance v. Whirlpool Corporation, 716 F. 2d 1010 (4th Cir. 1983). At least one federal court has adopted the view that the 180 day time limit for the filing of a charge of discrimination as contained in the ADEA should be subject to tolling and estoppel because of "....the remedial nature of the legislation and the lack of legal training and guidance for many complainants." Dartt v. Shell Oil

Company, 539 F. 2d 1256 (10th Cir. 1976).

The equitable tolling issue raised by the present case necessarily involves a thorough consideration and analysis of two critical factors: First, the timing of when a complaining party acquires knowledge that an employment discrimination was discriminatory on account of age; and, secondly, the general degree and level of knowledge by a complaining party of his remedies and rights under the ADEA. At the heart of the question in the present case is the issue of whether the time limitation to be imposed upon the petitioner should be held to run from the date he was first notified of his termination or the date on which he first gained knowledge that the employment decision to terminate him was tainted with age discrimination.

The petitioner was informed on February 9, 1982 that he would be terminated from his employment effective February 15, 1982.

The purported explanation for his termination and the only explanation given him initially was that the respondents would be handling his sales territory in the future by telephone contact, rather than having a field representative. It was not until August, 1982, that the petitioner learned that the respondents had employed an individual 40 years younger than the petitioner to perform work that he had performed during his employment. It is not in dispute that the petitioner filed a charge of discrimination with the EEOC within the required 180 day time period after he first learned that he had been replaced by a much younger individual.

The majority view among the federal courts holds that the notice requirements of both Title VII and the ADEA do not begin to run until the employee knew or should have known of the facts that would support a charge of discrimination. Coke v. General Adjustment Bureau, Inc., 616

F. 2d 785 (5th Circ. 1980). Other courts have held that tolling should be allowed where the employer attempts to conceal a discriminatory act or misleads the employee or misrepresents the nature of the discrimination. Meyer v. Reigel Products Corporation, 720 F. 2d 303 (3rd Cir. 1983).

The decision by the Fourth Circuit does not seem to account for the issue of when the petitioner gained knowledge that his termination may have been discriminatory. This issue was analyzed by the Fifth Circuit in Reeb v. Economic Opportunity Atlanta, Inc. 516 F. 2d 924 (5th Cir. 1975). In Reeb, the Fifth Circuit considered that "....secret preferences in hiring and subtle means of illegal discrimination are unlikely to be readily apparent to the individual discriminated against and employers who discriminate often cloak their policies with a semblance of rationality, and may seek to convey to a victim an attitude of neutrality of even sympathy." The

Reeb court concluded that "....the time period prescribed under the statute would not begin to run until the facts that would support a charge of discrimination were apparent or should have been apparent to a person with a reasonably prudent regard for his rights similarly situated to the plaintiff."

The effect of the decision by the Fourth Circuit would be to require that older employees in the work force file charges of discrimination at the time of their termination, all explanations notwithstanding, in the absence of any specific knowledge or belief that they may be the victim of an age-based discriminatory employment decision. Certainly, this "file now, ask questions later" approach is not what was intended by the Congress in adopting the filing limitations.

The petitioner would contend that the better approach would be to reconcile the

decision by the Fourth Circuit with the decisions by either circuits, Coke v. General Adjustment Bureau, Inc., supra and Reeb v. Economic Opportunity Atlanta, Inc., supra. For this reason, petitioner would contend that a writ of certiorari should be entered in this case to review this question raised by the Fourth Circuit's decision.

A second consideration essential to analysis of the equitable tolling issue is the degree of knowledge which a complaining party would be charged with meeting in the context of filing an age discrimination claim. This consideration raises an examination of the "posting" requirements of ADEA and the awareness by an employee of his rights under the ADEA.

It is undisputed in the present case, that the petitioner was not aware of any information posted at the respondents' business premises concerning his rights under the ADEA. Both the District Court

and the Fourth Circuit, in considering this issue, chose to disregard the closest factual case offered by either party on this issue. The facts in the present case are substantially the same as those in Charlier v. S.C. Johnson and Son, Inc., 556 F. 2d 761 (5th Cir. 1977). In Charlier, two employees brought an age discrimination action against their employer after long years of service. Both employees were field salesmen and had very little contact with the employer's regional office. It was undisputed, however, that the employer posted ADEA notices on the bulletin board of its regional offices. The Fifth Circuit considered the difference between employees working in a central physical location, such as a factory or office building, with those employees required to be away from this location for long periods of time. The Fifth Circuit held that the

posting of such notices on the bulletin board at the regional offices by the employer in that case provided the field employees with "...no notice whatsoever." The Court reasoned that "...notice adequate for one group of employees does not necessarily suffice for another group working primarily in a different locality."

In the present case, the Fourth Circuit "with respect" elected to not adopt the interpretation of the posting requirement expressed in Charlier. The Fourth Circuit did acknowledge that "...it might well be desirable to require employers to send ADEA notices to traveling sales representatives and others who work off the company's premises. Congress might adopt such a requirement in the future."

The petitioner would respectfully request that this court reconcile this significant conflict between the circuits by granting the writ in this case to review the decision by the Fourth Circuit.

II.

THE FOURTH CIRCUIT COMMITTED ERROR IN THIS CASE BY RESOLVING GENUINE FACTUAL DISPUTES AND CONCLUDING THAT THE PETITIONER HAD NOT ESTABLISHED A PRIMA FACIE CASE OF AGE DISCRIMINATION.

It is not disputed in the present case that the order of proof recognized by this honorable court in McDonnell-Douglas Corporation v. Green, 411 U.S. 792 (1973) is applicable to an analysis of whether the petitioner has established the elements of a prima facie case under the ADEA. It is further not disputed that the petitioner has met the first three elements of this test.

It is further clear that a party moving

for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure has the burden of clearly establishing the lack of any triable issue of fact and that all disputed matters and inferences should be resolved in favor of the non moving party. It is not the trial court's function, when considering a motion for summary judgment, to resolve any genuine factual issue. United States v. Diebold, 369 U.S. 654 (1962).

The federal courts have held that a plaintiff need only demonstrate that there are material issues of fact as to the existence of a prima facie case. It is not necessary that he establish the existence of a prima facie case by the preponderance of the evidence. Reardon v. Sharm Steel Corporation, 36 FEP Cases 1824 (W.D. Pa 1985).

The Fourth Circuit adopted the reading of the evidence in this case by the

District Court that all of the evidence on the question of whether the petitioner had made a prima facie case was "...of a piece."

Factual questions abound in the present case as to one of the critical issues involved, that being the degree of restructuring undertaken by the respondents. The District Court found a "...rather complete metamorphasis" of the respondents' organization.

However, the petitioner contends that the respondents experienced a sudden, swift and silent action with regard to its restructuring, without any indication or notice being given to its employees.

Persisent factual questions exist in this case as to the decision making process for the reorganization of the respondents' organization, whether any consideration was given to retention of the petitioner, and the role which the petitioner's

replacement was to play in the restructured organization. The petitioner would contend that the summary disposition of these factual issues was both inappropriate and inconsistent with the decisions of the federal courts.

The petitioner would request, on this ground also, that this court grant a writ to review the decision by the Fourth Circuit.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. The petitioner would respectfully request that this court grant this petition for certiorari to review the decision by the Fourth Circuit and to review the inherent conflicts between the decision by the Fourth Circuit and other circuits.

Respectfully submitted,

David E. Ralston
Attorney at Law
18 Depot Street
P. O. Box 1196
Blue Ridge, Georgia 30513
(404) 632-2221
Counsel for Petitioner

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE WESTERN DISTRICT
OF NORTH CAROLINA
BRYSON CITY DIVISION

C. M. ENGLISH, Plaintiff	)	CIVIL NO. B-C-85-438
versus	)	MEMORANDUM OF DECISION
PABST BREWING COMPANY and PMP FERMENTATION PRODUCTS, INC., a wholly owned subsidiary of PABST BREWING COMPANY,	)	

Plaintiff, a former employee of defendants, brought this action to Section 7 (b) of the Age of Discrimination in Employment Act (ADEA) [29 U.S.C. § 626(b)] against Pabst Brewing Company and PMP Fermentation Products, Inc. [hereinafter collectively defendants], his former employers. According to the undisputed allegations in the file, defendants, on February 9, 1982, informed plaintiff that his active employment would be terminated as of February 15, 1982 (his 65th birthday). Plaintiff filed his charge of

discrimination with the Equal Employment Opportunity Commission (EEOC) February 3, 1983, claiming that his termination was as a result of his age and constituted unlawful discrimination. On November 21, 1985, he filed this action based on those allegations. After filing Answer and undertaking some discovery, the defendants brought the matter before the court on Motion for Summary Judgment pursuant to Rule 56(b), Fed. R. Civ. P., asserting that no genuine issue of material fact exists. It appears to the court that the defendants' motion is well taken. The facts necessary to the entry of this decision are more fully set forth in the opinion which follows.

I.

Plaintiff's complaint, the undisputed answer, and evidence offered by the defendants in support of their motion make it affirmatively appear that plaintiff's claim is time-barred. the ADEA expressly sets forth a timeliness requirement in 29 U.S.C. § 626 (d), as follows:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed:
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred or within 30 days after receipt by the individual of notice of termination of proceedings under state law, whichever is earlier.[1]

This provision would appear to be dispositive of defendants' motion and, therefore, plaintiff's claim, as plaintiff did not file with the EEOC until 353 days after his termination and 359 days after he was informed of the termination.[2] The Fourth Circuit has repeatedly ruled that this section operates as a statute of limitations so that failure to comply with the time requirements will result in dismissal of the action. Lawson v. Burlington Industries, Inc., 683 F. 2d 862 (4th Cir. 1982); Vance v. Whirlpool Corp., n. 2, supra; Price v. Litton Business System, Inc., 694 F. 2d 963 (4th

Cir. 1982). The Fourth Circuit has further upheld the use of summary judgment as a vehicle for the accomplishment of this result. Lawson v. Burlington Industries, Inc., supra. Therefore, this court will allow defendants' Motion for Summary Judgment.

---

1. Section 14(b) of the ADEA (29 U.S.C. § 633) creates an exception to the 180-day rule. However, the exception applies only in those states which by state statute and through state agency prohibit and provide remedy for age discrimination. North Carolina not being such a state, the exception is not applicable.

2. The date of notification rather than the date of the actual termination would appear to govern. Vance v. Whirlpool Corp., 716 F. 2d 1010 (4th Cir. 1983). However, in this case, the question is not material since the claim is time-barred from either date.

II.

Plaintiff attempts to escape the bar of the timeliness requirement by asserting that since 626(d) creates a statute of limitations rather than a jurisdictional requirement, the running of the 180 days equitably can be tolled. While plaintiff is correct as to the law (Vance v. Whirlpool Corp., supra), the pleadings, affidavits, portions of depositions, and other matters before the court in support of and in opposition to the Motion for Summary Judgment make it plain to the court that, factually, there is no ground for equitable tolling in this case and that no genuine issue of material fact exists as to the absence of any such ground. Plaintiff asserts that the statute should be tolled where the employer has failed to meet the requirements of 29 U.S.C. § 627, which provides that "every employer....shall post and keep posted in conspicuous places upon its premises a notice....appropriate to effectuate the

purposes of this chapter." Again, plaintiff's proposition of law is correct. The Fourth Circuit has so held as to factually appropriate cases. "The 180-day period should be tolled by reason of (the employer's) failure to post the statutory notice." Vance v. Whirlpool Corp., supra, at 1013. Furthermore, "once the 180-day period has been tolled due to the employer's failure to post the statutory notice, it has been held that the period will begin to run from the time that the employee acquires actual knowledge of his rights or retains an attorney." Id., at 1013, citing Kephart v. Institute of Gas Technology, 581 F. 2d 1287 (7th Cir. 1978); and Bonham v. Dresser Industries, Inc., 569 F. 2d 187 (3d Cir. 1977, as amended 1978). Again, however, this is not a factually appropriate case.

Factually, plaintiff's argument in opposition to summary judgment on the non-posting ground for tolling of the statute of

limitations leans upon the slender reed of the following sentence in plaintiff's own Affidavit: "My employer had not posted information on the ADEA of which I was aware." (Emphasis supplied.) This sentence simply does not create a genuine issue of material fact when juxtaposed against defendants' affidavits from present and former employees to the effect that proper posting had in fact been accomplished at the company's plant and corporate headquarters. Defendants, therefore, appear to have established proper posting. "If notice is properly posted and the employee does not see it or sees it but is still not aware of his rights, there will normally be no tolling of the filing period." McClinton v. Alabama Byproducts Corp., 743 F. 2d 1483, 1486 (8th Cir. 1984). To the same effect is Hrzenak v. White Westinghouse Co., 682 F. 2d 714 (8th Cir. 1982). While the Fourth Circuit appears to be silent on this specific question, the Eighth Circuit cases appear

to this court to reach the only reasonable result, and the court will follow them.

Plaintiff argues that the instant case should not be governed by the logic of McClinton and White Westinghouse since plaintiff did not work out of either the headquarters or the plant but apparently worked out of his own home in North Carolina and visited the company facilities in Wisconsin not much more frequently than annually. In support of his argument, he offers Charlier v. S.C. Johnson & Son, Inc., 556 F. 2d 761 (5th Cir. 1977). In that case, as in the case at bar, the plaintiff worked in outside sales and only occasionally visited the facility where the posting had been made. That court held a factual question to exist as to the adequacy of the posting. This court, while noting that the Fifth Circuit decision is not binding precedent, nonetheless would note that in

the instant case there appears to be no dispute of material fact as to the proposition that the employer made all reasonable compliance with the language of 29 U.S.C. § 627 requiring that the posting be "in conspicuous places upon its premises...." The premises as to which affidavits exist were apparently the only facilities which plaintiff ever visited, and one of them was the facility in which he was informed of his termination. Furthermore, this court believes the Eighth Circuit to have been correct in McClinton when it held that the tolling of the statute occasioned by nonposting or inadequate posting would continue only up until such time as "the employee acquires general knowledge of his right not to be discriminated against on account of age, or the means of obtaining such knowledge. We do not think it necessary to toll the notification period up to the time that the employee obtains knowledge of his specific rights

under the ADEA and/or the existence of the 180-day filing period." McClinton v. Alabama Byproducts Corp., supra, at 1486.[3] In the case at bar, defendants have offered the court plaintiff's own deposition testimony to the effect that he was generally aware of his rights against age discrimination well before his termination. It appears to the court that where an employee is generally aware of his rights, and where the employer has complied with the language of 29 U.S.C. § 627, to require anything further would not only be unduly burdensome but would render the 180-day requirement of Section 626 meaningless as to any employer of outside salesmen or other employees who are not daily on the employer's actual premises.

---

3. Plaintiff argues Vance v. Whirlpool Corp., supra for the proposition that the statute remains tolled until the employee acquires specific knowledge of his rights or the advice of counsel. However, the language in that case upon which plaintiff relies has applicaiton only to the distinct

facts then before the court. That plaintiff acquired no knowledge of his rights until after the 180-day period from termination had already expired but during a period in which the statute was tolled by a conceded failure to post. It appears to this court that there is other-language in Vance controlling of the facts in this case. "Ordinarily we would agree with Whirlpool that the 180 day period should be tolled only until such time as an employee observes the statutory notice or otherwise learns of his rights under the ADEA." Id., at 1013 (emphasis supplied).

other employees are not daily on the employer's actual premises.

III.

Plaintiff further argues that the statute should be tolled equitably on the basis of Mayer v. Reigel Products Corp., 720 F.2d 303 (3d Cir. 1983), which held that tolling would be allowed where the employer attempted to conceal a discriminatory act or to mislead the employee or misrepresented the nature of the discrimination. However, plaintiff overlooks the express language from the Fourth Circuit in Price v. Litton Business Systems, Inc., supra, to the effect that, "the statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in a timely fashion is a consequence of either deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." Id., at 965.

In this case, plaintiff's only factual support for this tolling argument is that defendants informed him that they were reorganizing the sales effort based on a new and smaller product line and that the sales job previously handled by him in the field in the southeastern United States would subsequently be handled out of the company's Wisconsin headquarters, principally by telephone. Plaintiff asserts that he was deceived and only later (August 1982) learned that a younger man (a Mr. Lex) was making customer calls in the field in the southeast. However, defendants' affidavits and deposition evidence are undisputedly to the effect that Lex worked out of Wisconsin principally by telephone and made field visits to the southeast only three or four times a year, as opposed to the five-day-a-week visits previously practiced by the plaintiff. The literally or almost literally true statements of the defendants in this case, coupled with the fact that plaintiff's knowledge of the

employment of the younger man came to him through the defendants themselves, makes it appear to this court that there can be no genuine issue of material fact on this proposition. Defendants simply have done nothing rising--or sinking--to the level contemplated by the above-quoted language from Price. Therefore, plaintiff is not entitled to an equitable tolling of the statute of limitations, and defendants are entitled to their summary judgment.

IV.

Finally, even if plaintiff had complied with the timeliness requirements, defendants are nonetheless entitled to their summary judgment. In age discrimination cases, plaintiff has the burden of establishing that the action complained of (in this case, termination) was taken because of age. That is, he must prove that age was a determinative, a "but-for" factor in the decision. See, e.g., Tice v. Lampert Yards, Inc., 761 F. 2d 1210, 1217, 1222

(7th Cir. 1985). The order of proof in ADEA cases is borrowed from McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), requiring, first, the plaintiff to establish a prima facie case; then the defendant to go forward with a nondiscirminatory reason for the employment action; then the plaintiff to establish that the nondiscriminatory reason was a pretext for the forbidden discrimination. EEOC v. Western Electric Corp., 713 F. 2d 1011 (4th Cir. 1983). In weighing the sufficiency of a plaintiff's evidence and, therefore, in determining for purposes of summary judgment motion the materiality of dispute of fact,

> The elements of the plaintiff's "prima facie case" in the usual ADEA case are:(1) the plaintiff is in the protected age group; (2) the plaintiff was discharged or demoted; (3) at the time of the discharge or demotion the plaintiff was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, the plaintiff was replaced by someone of comparable qualifications outside the protected class. Id., at 1014 (emphasis supplied).

Without discussing the first three

elements, the evidence before the court presents no genuine issue as to any fact material to the fourth element. All the evidence on this issue is of a piece, and all reflects that the company underwent a rather complete metamorphosis. New management dropped from the product line the malt syrup which had been plaintiff's main area of expertise. The company's products then included only industrial chemical compounds. The newly hired replacement (Mr. Lex), concededly 40 years younger than the plaintiff, also possessed a cum laude degree in chemistry and three years' experience in chemical sales. Plaintiff had no comparable educational background and was principally experienced in the sale of the malt syrup line. The new job filled by Lex involved a national sales territory; a concentration on long-distance sales out of Milwaukee; and only occasional field visits, few of them in the southeast. Plaintiff's forte had been field work in the southeast and personal

relationships with southeastern customer. Based upon his undisputed evidence, plaintiff cannot meet the necessary fourth element of the prima facie test and, even had his claim been timely filed, cannot survive defendants' motion for summary judgment.

This court, therefore, is awarding defendants summary judgment by Order filed contemporaneously herewith.

This 8 day of Oct., 1986.

S/
DAVID B. SENTELLE
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 86-3148

C. M. ENGLISH,

Plaintiff-Appellant,

versus

PABST BREWING COMPANY;
PMP FERMENTATION PRODUCTS,
INC., a wholly owned
subsidiary of Pabst
Brewing Company,

Defendant - Appellee

Appeal from the United States District Court for the Western District of North Carolina, at Bryson City. David B. Sentelle, District Judge. (CA-85-0438).

Argued: May 8, 1987 Decided: September 15, 1987

Before WIDENER, WILKINSON, and WILKINS, Circuit Judges.

David Edmund Ralston for Appellant; Thomas Paul Godar (John R. Sapp; Michael, Best & Friedrich; Gwynn Radeker; Roberts, Stevens & Cogburn, P.A. on brief) for Appellees.

WILKINSON, Circuit Judge:

C. M. English was employed by the Pabst Brewing Company as a sales representative. In February of 1982, Pabst informed English that his employment was to be terminated. English sued under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 et seq. The district court granted summary judgment to the defendant because English did not file his ADEA charge within the 180 day period imposed by the statute and because he failed to establish that the termination was based on his age. C. M. English v. Pabst Brewing Co., 645 F. Supp. 186 (W.D.N.C. 1986). We affirm.

1.

At the time his employment with Pabst ended, English sold malt syrup and industrial chemicals to firms in the southeastern United States. English was sixty-five years old. Pabst told him upon his termination that it was restructuring its sales staff and product lines and that the field

work previously handled by him would be handled primarily by telephone from the company's headquarters.

Six months later, in August of 1982, English had a chance encounter with Irvin Troy, his former sales supervisor. Accompanying Troy was Donald Lex, who had been hired by Pabst as a sales representative in July. Lex was twenty-five years old.

Roughly six months after this meeting--359 days after he was notified of his termination -- English filed a charge of age discrimination with the EEOC. After filing his charge with the EEOC, English commenced this civil action. He alleged that Pabst had replaced him with a younger man and thus committed age discrimination. In granting Pabst's motion for summary judgment, the district court held that English's claim was time-barred by the provisions of § 626(d) of the ADEA and that Lex was not English's replacement, but filled a position requiring different skills and expertise

created in the company's reorganization.

II.

The ADEA requires that a plaintiff file a charge with the EEOC before filing a civil action; this charge must normally be filed within 180 days of the discriminatory practice. 29 U.S.C. § 626(d). Where the charge is based on a job termination, the 180-day period runs from the date on which the plaintiff is notified of his termination. Felty v. Graves-Humphreys, 785 F. 2d 516, 518-19 (4th Cir. 1986); Price v. Litton Business Systems, 694 F. 2d 963, 965 (4th Cir. 1982). The limitation period facilitates the prompt resolution of disputes upon fresh recollections. It also reflects the point at which Congress has determined the prospect of litigation should presumptively be laid to rest.

Because the 180-day period is akin to a statute of limitations, rather than a jurisdictional prerequisite to filing suit, a plaintiff can obtain relief from it under

the doctrines of equitable tolling and equitable estoppel. Vance v. Whirlpool Corp., 716 F. 2d 1010, 1011-12 (4th Cir. 1983). Equitable exceptions to the statutory limitations period should be sparingly applied, however. The certainty and repose these provisions confer will be lost if their application is up for grabs in every case. As the equitable exceptions to the charging period have been the subjects of some confusion -- in the present case, for example, the parties used the terms equitable estoppel and equitable tolling interchangeably -- we will review them briefly before applying them to the case before us.

The doctrines of equitable tolling and equitable estoppel have a common original; they are based primarily on the view that a defendant should not be permitted to escape liability by engaging in misconduct that prevents the plaintiff

from filing his or her claim on time. As the Supreme Court explained in Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231, 232-33 (1959),

> No man may take advantage of his own wrong. Deeply rooted in our jurisprudence this principle has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations.

Equitable tolling applies where the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action. See Lawson v. Burlington Industries, 683 F.2d 862, 864 (4th Cir. 1982); Cerbone v. International Ladies' Garment Workers' Union, 768 F. 2d 45, 48 (2d Cir. 1985); Meyer v. Riegel Products Corp., 720 F. 2d 303, 307-08 (3d Cir. 1983). To invoke equitable tolling, the plaintiff must therefore show that the defendant attempted to mislead him and that the plaintiff reasonably relied on the misrepresentation by neglecting to file a timely charge.

Lawson 683 F. 2d at 864; Coke v. General Adjustment Bureau, 640 F. 2d 584,595 (5th Cir. 1981).

Equitable estoppel applies where, despite the plaintiff's knowledge of the facts, the defendant engages in intentional misconduct to cause the plaintiff to miss the filing deadline. Felty v. Graves-Humphreys, 818 F.2d 1126 (4th Cir. 1987); Price, 694 F. 2d at 965. See also Cerbone, 768 F. 2d at 49-50; Dillman v. Combustion Engineering, 784 F. 2d 57, 60-61 (2d Cir. 1986). "The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge." Price, 694 F. 2d at 965.

III.

English seeks to invoke the principle of equitable tolling. He alleges that Pabst

concealed material information from him in two ways: first, by failing to post the required notice about ADEA rights, and second, by giving him a pretextual reason for his termination. Neither allegation is supported by the facts in the summary judgment record, however.

A.

The ADEA requires an employer to post "in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of the ADEA." 29 U.S.C. § 627. Such a notice must be prominently and accessibly placed. 29 U.S.C. § 627; 29 C.F.R. § 1627.10. If an employer violates the posting requirement, the charging period is tolled until the plaintiff "acquires actual knowledge of his rights or retains an attorney." Vance, 716 F.2d at 1013. In the

present case, we believe the district court properly rejected plaintiff's argument that the statutory limitations period should be equitably tolled based on the defendant's noncompliance with the posting requirement:

> Factually, plaintiff's argument in opposition to summary judgment on the non posting ground for tolling of the statute of limitations leans upon the slender reed of the following sentence in plaintiff's own Affidavit: "My employer had not posted information on the ADEA of which I was aware." (Emphasis supplied). This sentence simply does not create a genuine issue of material fact when juxtaposed against former employees to the effect that proper posting had in fact been accomplished at the company's plant and corporate headquarters. Defendants, therefore, appear to have established proper posting.

English, 645 F.Supp. at 188. See Posey v. Skyline Corp., 702 F. 2d 102 (7th Cir. 1983) (summary judgment proper where defendant's testimony indicated that ADEA notice was posted and plaintiff stated only that he did not recall seeing one).

English argues that even if the notice was posted, the charging period should still be tolled because he did not read the notice.

This argument misapprehends the nature of equitable tolling, which is based on the wrongdoing of the defendant. Hence, the district court properly rejected it. "If notice is properly posted and the employee does not see it or sees it but is still not aware of his rights, there will normally be no tolling of the filing period." McClinton v. Alabama By-Products Corp., 743 F.2d 1483, 1486 (11th Cir. 1984); accord Hrzenak v. White-Westinghouse Appliance Co., 682 F.2d 714, 718-19 (8th Cir. 1982).

English further argues that the district court erred in applying this rule to field salesmen who infrequently visit the company's offices. He refers us to the Fifth Circuit's decision in Charlier v. S.C. Johnson & Son, Inc.,556 F.2d 761 (5th Cir. 1977), where the court of appeals remanded for a determination of whether a salesman who worked mainly in his home was adequately informed of his rights by an ADEA

notice posted in a regional office. That decision was grounded in the court's understanding that the posting requirement imposes a broad obligation on employers to "provide employees with a meaningful opportunity of becoming aware of their ADEA rights." 556 F.2d at 764.

With respect, we do not adopt the interpretation of the posting requirement expressed in Charlier. It might well be desirable to require employers to send ADEA notices to traveling sales representatives and others who work off the company's premises. Congress might adopt such a requirement in the future. The terms of the present statute and its implementing regulation, however, require only that the notice be posted "in conspicuous places upon (the employer's) premises." 29 U.S.C. § 627. Pabst complied with the terms of the statute. Notice was posted on the only facilities in the company that plaintiff ever visited, and which plaintiff did visit

when he was informed of his termination. Because there is no genuine dispute of fact as to whether Pabst complied with the notice requirement, English cannot invoke equitable tolling on that basis.

B.

English alleges further that his younger "replacement," Donald Lex, was not hired for some five months after his own termination, that he did not learn of Lex's employment for six months after his discharge, and that he was thus precluded from bringing his ADEA action before that time. While a time bar might be tolled on equitable grounds, "if the employee could show that it would be impossible for a reasonably prudent person to learn that his discharge was discriminatory," Miller v. International Telephone and Telegraph Corp., 755 F.2d 20, 24 (2d Cir. 1985), we do not think English has carried his burden in this regard.

First, there has been no showing that Pabst concealed or misrepresented anything

about its own reorganization or about English's dismissal. Nothing about the timing or the manner of Lex's employment suggests any attempt by the company to induce English to forego his rights and delay filing his ADEA charge. In fact, as the district court noted, "plaintiff's knowledge of the employment of the younger man came to him through the defendants themselves." 645 F.Supp. at 189. Secondly, as discussed fully in the following section, it is doubtful that Lex was in fact a replacement of English at all. (The record indicates that Lex made national contracts from the company's Milwaukee office by telephone; English made personal visits to customers five days a week exclusively in the southeast. Lex sold only chemical products; English sold malt products as well). Third, if Lex's employment had the critical significance English attributes to it, we are unable to understand why he waited nearly six months

more before filing a charge. At bottom, equitable tolling rests upon the proposition that the defendant's actions require relieving the plaintiff from the burden of a statutory limitations period. We cannot perceive in this set of circumstances any reason to overturn the district court's grant of summary jdugment and afford plaintiff the extraordinary relief that he requests.

IV.

In addition to his failure to file a timely charge, English's claim also fails on substantive grounds. English has not presented any evidence to show that his termination was the result of age discrimination. "To establish discrimination in an age discrimination case, the plaintiff must prove by a preponderance of the evidence that 'but for' the defendant's motive to discriminate against an older employee, he would not have been terminated."

Wilhelm v. Blue Bell, Inc., 773 F.2d 1429, 1432 (4th Cir. 1985). Because English failed to carry this burden, the district court properly granted summary judgment on the merits of this case.

Two routes are available for proving "but for" causation in age discrimination cases. The first is to use ordinary means of proof through direct or indirect evidence; the second route -- the one on which English relies -- is the judicially fashioned proof scheme for Title VII cases. Wilhelm, 773 F.2d at 1432; Loveland v. Sherwin Williams Co., 681 F.2d 230, 239-241 (4th Cir. 1982). To establish a prima facie case of discrimination under the Title VII proof scheme, the plaintiff must submit evidence to show

> (1) the plaintiff is in the protected age group (2) the plaintiff was discharged or demoted; (3)at the time of discharge or demotion, the plaintiff was performing his job at a level that met his employer's legitimate expectations; and (4) following his discharge or demotion, the plaintiff was

replaced by someone of comparable qualifications outside the protected class.

E.E.O.C. v. Western Electric Co., Inc., 713 F.2d 1011, 1014 (4th Cir. 1983).

We believe the district court correctly analyzed English's case in accordance with this scheme:

> Without discussing the first three elements, the evidence before the court presents no genuine issue as to any fact material to the fourth element. All the evidence on this issue is of a piece, and all reflects that the company underwent a rather complete metamorphosis. New management dropped from the product line the malt syrup which had been plaintiff's main area of expertise. The company's products then included only industrial chemical compounds. The newly hired replacement (Mr. Lex), concededly 40 years younger than plaintiff, also possessed a cum laude degree in chemistry and three years experience in chemical sales. Plaintiff had no comparable educational background and was principally experienced in the sales of the malt syrup line. The new job filled by Lex involved a national sales territory; a concentration on long-distance sales out of Milwaukee; and only occasional field visits, few of them in the Southeast. Plaintiff's forte had been field work in the southeast and personal relationships with southeastern customers. Based upon this undisputed evidence, plaintiff cannot meet the necessary fourth element of

the prima facie test and, even had his claim been timely filed, cannot survive defendants' Motion for Summary Judgment.

English, 645 F.Supp. at 190.

The judgment of the district court is therefore

AFFIRMED.

(2)

No. 87-1723

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

C. M. ENGLISH,

Petitioner

vs.

PABST BREWING COMPANY and
PMP FERMENTATION PRODUCTS, INC.
a wholly owned subsidiary of
PABST BREWING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

WILLIAM M. BITTING
KYLE D. BROWN
JAMES A. BOWLES

HILL, FARRER & BURRILL

445 South Figueroa St.
34th Floor
Los Angeles, CA 90071
(213) 620-0460

Attorneys for Respondents
PABST BREWING CO., and
PREMIER MALT PRODUCTS, INC.

Publishing and Graphic Electronic Services, Inc. (PAGES) / (213) 474-7855

19 pp

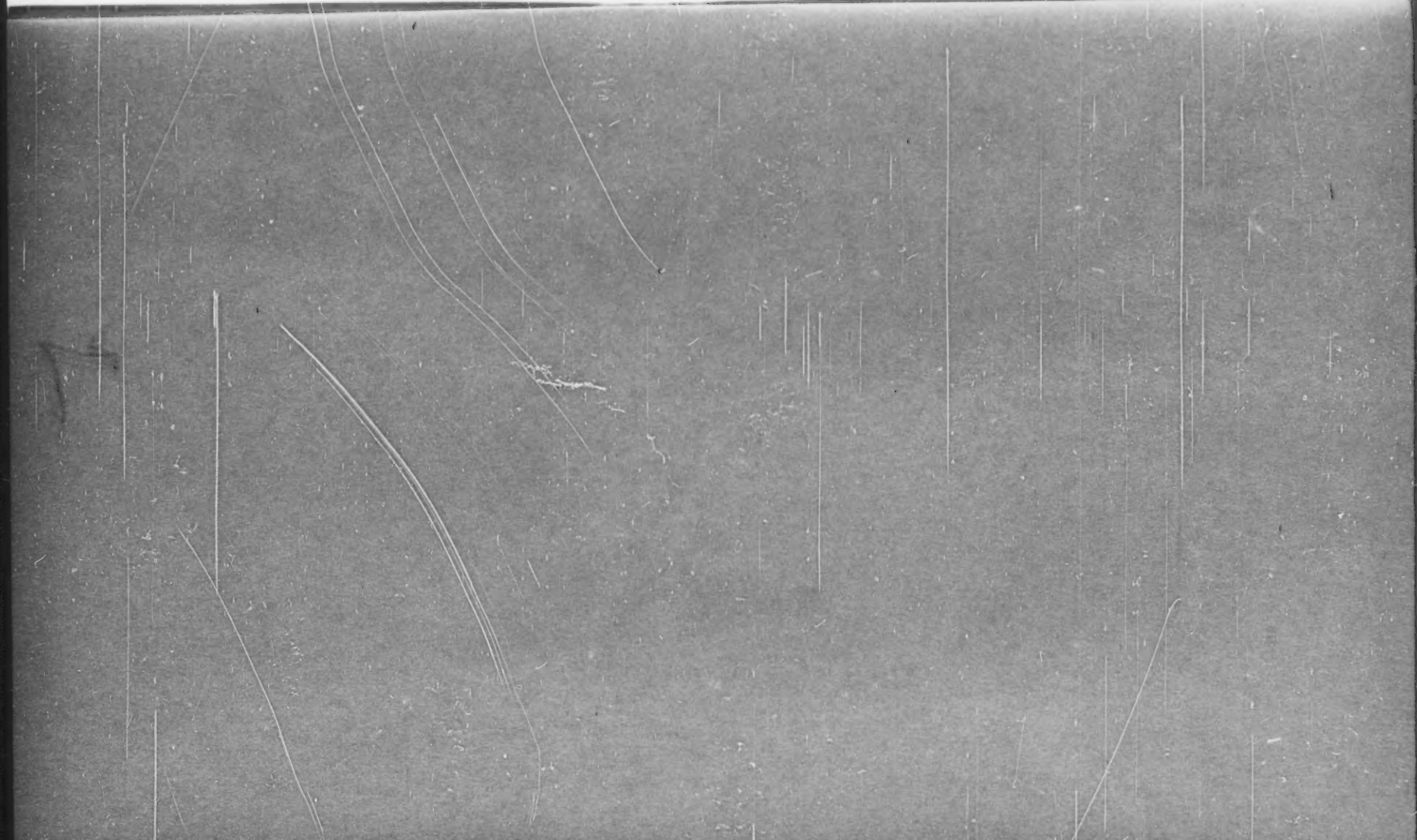

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

In the
Supreme Court
of the United States
OCTOBER TERM, 1987

C.M. ENGLISH,

Petitioner,

vs.

PABST BREWING COMPANY and
PMP FERMENTATION PRODUCTS, INC.,
a wholly owned subsidiary of
PABST BREWING COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the Court of Appeals properly upheld the granting of summary judgment where Petitioner failed to meet his burden to establish a *prima facie* case of age discrimination.
2. Whether Petitioner's argument that the Statute of Limitations should be tolled is moot because the lower court properly upheld the granting of summary judgment on the merits of the age discrimination claim.
3. Whether the lower court properly refused to toll the Statute of Limitations because required

information on the Age Discrimination in Employment Act was properly posted at Respondents' premises in accordance with 29 U.S.C. §627 and 29 C.F.R. §1627.10, and Respondents did not conceal or misrepresent anything which would justify Petitioner's belated charge which was 179 days late.

STATEMENT OF THE CASE

Petitioner, Charles M. English, was employed by Respondent, Premier Malt Products, Inc. (herein "PMP"), as a field sales representative on or about August 4, 1958. PMP was a subsidiary of Respondent, Pabst Brewing Co. (herein "Pabst").[1] PMP initially produced and sold primarily malt products and later began producing and selling textile enzymes, as well as other industrial chemicals in an effort to maintain sales. The Petitioner was hired as a field salesman for the sale of malt products in the southeastern United States and later took responsibility for the sale of industrial chemicals.

Petitioner was terminated in a reduction in force after PMP had suffered from falling sales in spite of having added industrial chemicals to its product line. Thereafter Pabst decided to cease producing malt products entirely. On April 15, 1982, Pabst sold the PMP malt product line to a Michigan concern. As a result of the closure of the malt product portion of the PMP line, a complete restructuring of its sales activities was undertaken. Sales through field offices

---

[1] Since May 1985, Pabst has been a subsidiary of S & P Co.

were eliminated and all sales activities were more closely coordinated with the Milwaukee office. Customers were serviced by telephone to reduce the number of direct sales calls and only industrial chemicals were sold. As a result of this contemplated restructuring, and between February and April 1982 *the entire field sales staff was eliminated.* Petitioner was informed of his termination on February 9, 1982, effective February 15, 1982, and two other field sales representatives, Gerald Hovley and Donald Clark, and the Sales Manager, Paul Brandli, were terminated effective April 30, 1982. In addition, PMP accepted the resignation of Richard Knors, the remaining field representative.

In the course of implementing its new sales structure following the sale of its malt products line, PMP identified the need for one additional marketing position in Milwaukee. This position was for a Chemical Sales Manager who would act as assistant to Irvin Troy, Sales Manager of PMP. Troy had generally discussed this opening with Hovley and Knors, as they were his two best salesmen. In Knors' most recent evaluation, he rated the best of the four field sales representatives and had received consistently high evaluations from his employer during his tenure. Hovley was rated the second best field sales representative in the most recent evaluation prior to his termination and, like Knors, had consistently received above average ratings by PMP. Further, both Knors and Hovley had strong backgrounds in chemistry, one of the major qualifications for the new sales position. Knors had received a degree in food science from Rutgers University and Hovley had a chemistry degree from UCLA.

Petitioner had also been evaluated by PMP during his tenure. His 1981 evaluation showed he was rated an "average" employee and ranked third out of four sales representatives. His earlier evaluations also resulted in an "average" rating and included comments such as "limited ability to achieve new business, but with much prodding will pursue." Further, Petitioner's knowledge in the chemical sales area was limited as he had no formal training in chemistry. His strongest suit was rapport with customers in the Southwest, a strength which had little significance in the new scheme since all national customers were to be serviced out of the Milwaukee office, with infrequent stops on an individual customer basis.

Based on the relevant qualifications of their former field representatives, PMP did not even discuss this new position with Petitioner, let alone offer it to him.

Instead, it hired Donald Lex on July 19, 1982. Lex had graduated *cum laude* with a degree in chemistry and had previously worked as a successful chemical sales representative. Upon his hire by PMP, Lex worked out of the Milwaukee office with responsibility for sales and service throughout the nation but concentrated in the area east of the Mississippi. Much of his time was spent working out of the Milwaukee office, and he made only three or four trips a year to the Southeast section of the United States for actual sales calls.

After the Petitioner's termination, PMP did not replace his field sales position in the Southeast region of the United States, nor were any field positions created. Instead, upon completion of its restructuring

and by June, 1982, all sales functions were carried out in the central Milwaukee office by a reduced staff.

Though Petitioner was informed of his termination on February 9, 1982, he did not file his claim of discrimination with the EEOC until February 3, 1983, some 359 days after his notification of termination. His claim was filed almost six months after a chance meeting in South Carolina with PMP Sales Manager, Troy and Donald Lex at one of PMP's customer locations. Troy was informed by the customer that Petitioner was also present making a business call and Troy took the initiative to greet Mr. English and introduce him to Mr. Lex.

At all relevant times, PMP properly posted notices required under ADEA, 29 U.S.C. §627, in conspicuous places both in its production facilities and at its Milwaukee headquarters. Petitioner visited the Milwaukee plant at least once or twice a year and therefore had regular access to the ADEA postings. Also, Petitioner admits that immediately after he was informed of his termination, he visited the Pabst personnel offices in Milwaukee, where ADEA notices were posted. Petitioner further concedes that he was generally aware of the laws prohibiting discrimination based on age prior to his termination.

On November 21, 1985, Petitioner filed an action in the United States District Court for the Western District of North Carolina alleging age discrimination. After filing their answer and undertaking discovery, Respondents moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

The District Court granted Respondents' motion for summary judgment by order entered October 8, 1986.

The District Court held that the action was time-barred because the charge of discrimination had not been filed within 180 days after the alleged discriminatory termination. The District Court rejected Petitioner's equitable tolling arguments, holding that the facts were undisputed: (1) that Respondents had not concealed or mislead Petitioner; (2) that Respondents had posted ADEA notices; and (3) that Petitioner was generally aware of his right to be free of age discrimination and possessed such knowledge well before his termination.

The District Court went on to decide the substantive merits of the case, holding that Petitioner had failed to establish a *prima facie* case of age discrimination, because he could not establish the fourth element of the test — that he had been replaced by someone of comparable qualifications outside the protected class. The District Court found that all the evidence indicated that Donald Lex was hired for a substantially different position in national chemical sales, and that Petitioner had no background or education comparable to Lex's *cum laude* degree in chemistry and three years of chemical sales experience.

Petitioner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the District Court's decision on September 15, 1987. On the substantive issue, the Court of Appeals agreed with the District Court that Petitioner had failed to submit evidence showing the fourth element of the *prima facie* case. The Court of Appeals also affirmed the District Court's ruling that the claim was time barred and that no facts warranting tolling of the filing period were presented. Regarding the posting requirement, the

Court of Appeals noted that the affidavits of two former employees demonstrated that the ADEA notices had been properly posted at the Employer's premises at all relevant times in accordance with the statute, 29 U.S.C. §627, and implementing regulations, 29 C.F.R. §1627.10. The Appeals Court further noted that Petitioner had actually been present at the facility where the notices were posted at the time of his termination. Finally, the Court of Appeals agreed with the District Court that there were no facts showing concealment or deception by Respondents, and therefore the Appeals Court found equitable tolling to be inapplicable.

ARGUMENT

1. THE COURT OF APPEALS APPLIED ESTABLISHED LAW AND PROPERLY UPHELD THE GRANT OF SUMMARY JUDGMENT BECAUSE PETITIONER FAILED TO PRESENT A GENUINE FACTUAL ISSUE ON THE NECESSARY FOURTH ELEMENT OF A PRIMA FACIE CASE.

The decision below upholding summary judgment on the substantive age discrimination issue is eminently correct. It does not conflict with any decision of this Court or of any court of appeals. Accordingly, review by this Court is unwarranted.

As Petitioner notes (Pet. 20), it is well established that in the absence of direct evidence of age discrimination, the order of proof recognized by this Court in *McDonnell-Douglas Corporation v. Green*, 411

U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), is applicable to the issue of whether Petitioner established a prima facie case of age discrimination.

This Court has emphasized recently that summary judgment is a proper vehicle for the early resolution of unmeritorious lawsuits. First, this Court has made clear that if the non-moving party will bear the burden of proof at trial as to an element essential to its case, and that party fails to make a showing sufficient to establish a genuine dispute of fact with respect to that element, then summary judgment is appropriate. *Celotex v. Cattret*, ___ U.S. ___ , 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___ , 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). Finally, if the factual context makes the non-moving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a geniune issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 528 (1986).

In cases arising under the ADEA, the federal courts have not hesitated to uphold the grant of summary judgment where, as here, an age discrimination plaintiff has failed to present a genuine factual issue as to one of the essential *McDonnell-Douglas* elements of

the *prima facie* case. *Kephart v. Institute of Gas Technology*, 630 F.2d 1217, 1219 (7th Cir. 1980), *cert. denied*, 464 U.S. 1018 (1981); *Pace v. Southern Ry. System*, 701 F.2d 1383, 1390 (11th Cir. 1983), *cert. denied*, 464 U.S. 1018 (1983); *LaGrant v. Gulf & Western Mfg. Co., Inc.*, 748 F.2d 1087, 1090 (6th Cir. 1984); *Holley v. Sanyo Mfg. Inc.*, 771 F.2d 1161, 1168 (8th Cir. 1985); *Baldwin v. Sears, Roebuck & Co.*, 667 F.2d 458, 462 (5th Cir. 1982); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 463 (7th Cir. 1986); *Dorsch v. L.B. Foster Co.*, 782 F.2d 1421, 1425 (7th Cir. 1986).

Applying these established principles, the District Court and Court of Appeals found summary judgment appropriate because English could not establish the fourth element of the *prima facie* case, to wit, that he had been replaced by someone of comparable qualifications outside the protected class. No genuine factual dispute existed on this issue in that Lex, with a *cum laude* degree in chemistry and three years experience in chemical sales, was demonstrably better qualified for the position than English, who had no comparable education or experience. Further, the job itself had been restructured so markedly as to constitute a different position than that which Petitioner had formerly held.

The decisions of the lower courts were in complete accord with well-established principles regarding both the grant of summary judgment and the elements of a *prima facie* case of age discrimination. This Court has in recent years clarified the law regarding the standards for summary judgment and the elements of a *prima facie* case of employment discrimination, hence no further clarification of the law in these areas is

necessary. Moreover, this case turns on its own particular facts and affects only the parties hereto. Thus, there exists no reason for a grant of certiorari in this case.

Contrary to Petitioner's assertions (Pet. 20-23) there is no factual dispute on the bona fides of the corporate restructuring of PMP, and Petitioner has presented no evidence disputing the fact that the Employer underwent a "rather complete metamorphosis" in selling its malt line, concentrating on chemical sales, eliminating the entire field sales staff and servicing its national customers mainly by telephone from Milwaukee. A grant of certiorari to review these undisputed facts would be clearly inappropriate.

2. BECAUSE THE COURTS BELOW PROPERLY DECIDED THE CASE ON ITS MERITS, THE ISSUES REGARDING EQUITABLE TOLLING OF THE STATUTE OF LIMITATIONS ARE MOOT, AND ANY PURPORTED ERROR WOULD CONSTITUTE HARMLESS ERROR.

As set forth above, the Court of Appeals properly upheld the grant of summary judgment on the merits of the age discrimination claim. For this reason, any purported error of the courts below regarding the equitable tolling of the Statute of Limitations would be moot and would constitute harmless error.

On the hearing of a writ of certiorari, the Court should not disturb the judgment of the lower courts where there is harmless error which does not affect the substantial rights of the parties. 28 U.S.C. §2111; *See*

Rule 61 Federal Rules of Civil Procedure. *United States v. Lane*, 474 U.S. 438, 445, 106 S.Ct. 725, 88 L.Ed.2d 814, 823 (1986); *Chapman v. California*, 386 U.S. 18, 21-22, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *McDonough Power Equipment v. Greenwood*, 464 U.S. 548, 553-554, 104 S.Ct., 78 L.Ed.2d 663 (1984).

In the instant case, the Court of Appeals properly decided the substantive age discrimination issue and therefore any purported error regarding tolling of the Statute of Limitations was harmless, as it did not affect the outcome of the case nor Petitioner's rights.

Because the lower courts properly decided the merits of the case, the equitable tolling issue is moot, as it will not affect the outcome of this case. This Court and all "federal courts are without power to decide questions that cannot affect the rights of litigants in this case before them." *Defunis v. Odegaard*, 414 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974), *quoting*, *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971). For this additional reason, the petition for certiorari should be denied.

3. THE LOWER COURTS PROPERLY REFUSED TO TOLL THE STATUTE OF-LIMITATIONS.

The decision below was also correct in upholding the grant of summary judgment for the additional reason that the claim was time barred and no tolling of the Statute of Limitations was appropriate. Contrary to Petitioner's assertions, the decision in this regard turns on its own particular facts, and is not in conflict with

Charlier v. S.C. Johnson & Son, Inc., 556 F.2d 761 (5th Cir. 1977), which is factually distinguishable.

In the instant case, it was undisputed that properly posted ADEA notices were present both at PMP's production facilities and at the headquarters of Pabst, its parent corporation, in Milwaukee. Affidavits by Pabst employees Gary Lewitzke and Al Crusoe were submitted in support of the summary judgment motion which stated that the information under 29 U.S.C. §627 was posted in a conspicuous place upon the premises of both the parent and the subsidiary. This is all that is required by the ADEA, 29 U.S.C. §627, and its implementing regulations. 29 C.F.R. §1627.10. Petitioner regularly visited the PMP plant once or twice a year during his tenure, and in fact, was present at both the PMP plant and the Pabst personnel offices, where ADEA notices were conspicuously posted, immediately subsequent to his termination. Petitioner also admitted that he was generally aware of the laws proscribing age discrimination even before he was terminated.

Based on these facts, the lower courts properly found equitable tolling to be inappropriate. The District Court found *Charlier* to be factually distinguishable because here ADEA postings were conspicuously posted in the very factility where Petitioner was informed of his termination, and Petitioner was generally aware of his right not to be discriminated against because of age even prior to that time.

By way of contrast, in *Charlier*, one of the plaintiffs contended he had visited the employer's regional office only three times in nineteen years and that he could not therefore have been aware of his ADEA rights on

account of such a posting. The plaintiff there further contended that the first time he became aware of any state or federal laws that proscribed age discrimination was a number of months *after* his discharge. These facts clearly distinguish *Charlier* and demonstrate that there is no actual conflict in the circuits on this issue.

Similarly, the lower courts in this case properly concluded that no equitable tolling was warranted, because there was no factual showing that PMP had concealed facts from or deceived Petitioner. Petitioner asserted that the fact that he had been replaced by Lex was concealed from him. The lower courts found that (1) PMP introduced Lex to Petitioner and hence was not concealing anything; (2) the restructured position was so markedly different that Lex was *not* Petitioner's replacement; and (3) Petitioner waited nearly six months after meeting Lex to file his ADEA charge. Based on these undisputed facts, the lower courts properly found no basis for equitable tolling of the Statute of Limitations. This result is correct, and review of this fact specific determination is unwarranted.

CONCLUSION

Based on the foregoing, the writ of certiorari should be denied.

DATED: May 13, 1988

Respectfully submitted,
HILL, FARRER &
BURRILL

WILLIAM M. BITTING
KYLE D. BROWN
JAMES A. BOWLES
445 South Figueroa St.
34th Floor
Los Angeles, CA 90071
(213) 620-0460

Attorneys for Respondents
PABST BREWING CO. and
PREMIER MALT
PRODUCTS, INC.

PROOF OF SERVICE BY MAIL

State of California

ss.

County of Los Angeles

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 10835 Santa Monica Boulevard, Suite 200, Los Angeles, California 90025; that on May 13, 1988, I served the within *Brief for Respondents in Opposition* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.E.
Washington, D.C. 20543
(Original + 40 Copies)

David E. Ralston, Esq.
Attorney at Law
18 Depot Street
P.O. Box 1196
Blue Ridge, Georgia 30513
(3 Copies)

I declare under penalty of perjury that the foregoing is true and correct. Executed on May 13, 1988, at Los Angeles, California.

Claude A. Lagardère
(Original signed)